ICBC Injury Claims And Future Wage Loss

February 24th, 2009

One of the most difficult types of damages to value when a person sustains serious and permanent injuries through the fault of another in a BC Car Crash is that of 'Future Wage Loss'.

Courts in British Columbia often view a person's ability to earn a living as a 'capital asset' and if disabling injuries are sustained then that capital asset becomes diminished. Accordingly BC Courts often assess damages for future wage loss as damages for a 'diminished earning capacity'.

The basic principles that courts consider in awarding damages for 'diminished earning capacity' were set out almost 25 years ago in a BC Supreme Court case named Brown v. Golaiy, These factors are as follows:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. *The plaintiff has been rendered less capable overall from earning income from all types of employment;*

2. *The plaintiff is less marketable or attractive as an employee to potential employers;*

3. *The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and*

4. *The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.*

In 2007, in a case named Steward v. Berezan, the BC Court of Appeal rejected a trial judges award for diminished earning capacity stating that "*... The claimant bears the onus to prove at trial a substantial possibility of a future event leading to an income loss, and the court must then award compensation on an estimation of the chance that the event will occur...*"

Ever since Berezan many ICBC Injury Defence Lawyers have argued that the law has changed since Brown v. Golaiy and that there is a higher burden to reach before damages for future wage loss can be awarded.

Reasons for judgement were released today by the BC Supreme Court (Ashmore v. Banicevic) dealing with this argument and concluding that the factors set out in Brown v. Golaiy remain good law. In a thorough analysis Madam Justice Smith gave the following reasons:

[140] While a literal reading of that statement might indicate a change in the law, embodying an express direction to inquire first into whether there is a substantial possibility of future income loss before embarking on assessment of the loss (see ***Chang v. Feng****, 2008 BCSC 49; 55 C.C.L.T. (3d) 203, and* ***Naidu v. Mann****, 2007 BCSC 1313, 53 C.C.L.T. (3d) 1), the Court of Appeal in* ***Djukic v. Hahn****, 2007 BCCA 203, 66 B.C.L.R. (4th) 314 (at para. 14) limited* ***Steward v. Berezan*** *to its facts, stating:*

...The error of the trial judge in Steward was in awarding damages for loss of earning capacity based on the plaintiff's inability to work as a carpenter in circumstances where he had not worked as a journeyman carpenter for twenty years prior to the trial and, at age 55, did not contemplate any return to the trade. The case turned on its facts and did not establish any new principle of law. Conversely here, the assessment was based on a business actively pursued by both respondents when the accidents intervened and not on any long abandoned occupation without a prospect of their return to it. I am satisfied that Steward has no application in the case at bar.

*[141] In **Sinnott v. Boggs**, the plaintiff was a 16-year-old girl who had been 11 at the time of the accident. The medical prognosis was that she would continue to suffer neck and shoulder aches, ongoing discomfort and intermittent headaches. The trial judge assessed non-pecuniary damages of $35,000, past wage loss of $2,400 and lost earning capacity of $30,000 "for being less marketable as an employee because of the limitations on her ability to work competitively in all jobs previously open to her". The assessment of damages was upheld on appeal. Mackenzie J.A. referred to the submission of the defendant on appeal that since there was no finding that any particular types of work were foreclosed to the plaintiff, no award for lost earning capacity could be made. He referred to a number of authorities, including **Steward v. Berezan**, at para. 11, and stated:*

All of those cases involved middle-aged plaintiffs in settled occupations. Their continuing symptoms resulted in continuing pain and occupational discomfort but they did not reduce the plaintiffs' ability to earn income in their chosen occupations. There was no prospect that they would change employment to occupations where their earning capacity would be impaired.

[142] MacKenzie J.A. then stated at para. 13 – 17:

In my view, the limitation on loss of earning capacity awards advanced by the appellant is not supported either in logic or by the authorities.

*Three of the four factors outlined in **Brown** are broad enough to support an award in circumstances where a plaintiff is able to continue in an occupation but the ability to perform and the earning capacity resulting from that ability are impaired by the injury.*

The line between non-pecuniary damages and damages for loss of earning capacity is between losses that sound in pain and suffering and loss of non-remunerative amenities on the one hand, and pecuniary losses in the form of a reduced ability to earn income on the other. There is no reason why an injury which permits a plaintiff to continue in a particular occupation but at a reduced level of performance and income should not be compensated for that pecuniary loss through damages for loss of earning capacity.

*In the case at bar, Ms. Sinnott is a young person who has not yet established a career and has no settled pattern of employment. In such circumstances, quantifying a loss is more at large. Southin J.A. commented on this distinction in **Stafford***

*[42] That there can be a case in which a plaintiff is so established in a profession that there is no reasonable possibility of his pursuing, whether by choice or necessity, a different one is obvious. For instance, on the one hand, if a judge of this Court were to be permanently injured to the extent that he or she could no longer do physical, in contradistinction to mental, labour, he or she would have no claim for impairment of earning capacity because the trier of fact gazing into the crystal ball would not see any possibility that the judge would ever abandon the law for physical labour, assuming that immediately before the accident the judge was capable of physical labour. But, on the other hand, if a plaintiff is young and has no trade or profession, the trier of fact gazing into the crystal ball might well consider whether the impairment of physical ability will so limit his future employment opportunities that he will suffer a loss. See e.g. **Earnshaw v. Despins** (1990), 45 B.C.L.R. (2d) 380 (C.A.).*

[43] There is, if I may use the word, a continuum from obviously no impairment of earning capacity from a permanent physical impairment, no matter how serious the impairment, to a very large potential loss which must be based on all the circumstances of the particular plaintiff.

I agree with those observations. Ms. Sinnott is in a category of those who are young and without a settled line of work. The trial judge has found that Ms. Sinnott faces limitations on her ability to work competitively in jobs that were previously open to her. In my view, that finding is an adequate foundation for the trial judge's award. I am

satisfied that there was evidence to support the trial judge's conclusions on the facts and there is no palpable and over-riding error of fact which would permit this Court to disturb her conclusion or award.

[143] I conclude that the approach I should take to the assessment of lost earning capacity has not changed. Accordingly, I must consider, with reference to the factors listed in ***Brown v. Golaiy****, whether the evidence establishes the basis for an award in this case, and if so, at what level.*